Supreme Court, U. S.
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IN THE

Supreme Court of the United States

SPRING TERM, 1978

Supreme Court No. 77-1125

Court of Appeals No. 77-5134

WILLIAM DONALD PERKINS,
Petitioner,

- vs -

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Edwin B. Ugorowski
Attorney for Petitioner
751 Morley Court
Dearborn, Michigan 48124
1-313-562-7966

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The petitioner by his attorney pray that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, entered November 10th, 1977, and January 16th, 1978, and judgment in accordance with that Opinion, hereinafter set forth (Appendix A, page 1a) is not yet officially reported.

2. JURDISDICTION

The judgment of the United States Court of Appeals, Sixth Circuit, was entered on November 10th, 1977, and reaffirmed on January 16th, 1978, is within the time to file this petition for certiorari. The jurisdiction of the Court is invoked under Rule 19 (1)(b):

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . . or has decided an important question of federal law which has not been, but should be, settled by this court . . . and . . . as to call for an exercise of this court's power of supervision.

3. QUESTION PRESENTED

The question presented by this petition is: Whether this defendant's right to a speedy trial as defined by the new Eastern District of Michigan Local Court Rule XXXI which sets forth that if a trial does not commence within 180 days of arraignment the local district court should dismiss the action has been denied by the lower court?

4. CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved herein is set forth in the Federal Constitution, Sixth Amendment, rights of the accused which states in all criminal prosecutions that the accused shall enjoy the right to a speedy and public trial, *Federal Code Annotated,* Constitution, Amendments, 1 to 21, page 176.

5. STATUTORY PROVISION INVOLVED

This constitutional right has been defined, in part, by Congress in Rule 50(b) of the Federal Rules of Criminal Procedure and the Speedy Trial Act of 1974, which, in part,

directs local district courts to establish a . . . plan for achieving prompt disposition of criminal cases. Title 18, *Federal Rules of Criminal Procedure* (Chapter 208).

6. LOCAL RULE PROVISION INVOLVED

This federal act was implimented by the Eastern District of Michigan in its Rule XXXI, effective September 27, 1975, which in Section 2(b)(1) provides for a period of 180 days from the date of plea of not guilty to date of trial in defining for that district what the right to a speedy trial will henceforth be therein, Rule XXXI (4)(c) provides that

> ". . . subject to the power of the Court to dismiss a case for unnecessary delay the failure to conform with the time limits prescribed in sections 2 and 7 of this plan shall not require the dismissal of the prosecution."

7. STATEMENT OF THE CASE

William Donald Perkins was indicted on May 9, 1975 for submission of false statements to the Department of Housing and Urban Development in two financial statements filed with that agency as part of application for multifamily mortgage insurance and for paying gratuities to a HUD mortgage credit analyst. Upon filing, the indictment was assigned to Judge Cornelia Kennedy. Mr. Perkins appeared for arraignment on May 13, 1975 and May 20, 1975. Judge Kennedy thereafter set a trial date for September 2, 1975. A motion by the defendant for serverance of the gratuity counts from the false statement charges was denied by Judge Kennedy on July 28, 1975. On August 27, 1975 the case was reassigned to the docket of Judge Damon Keith.

Trial dates before Judge Keith were set for November 4, 1975, December 30, 1975, July 8, 1976, and August 10,

1976. The record does not reflect any request by the Government for any one of the adjournments. Rather, the delays were caused by Judge Keith's trial time being consummed with one trial from October 7, 1975 through May 6, 1976 and thereafter with trial of custody cases.

Defendant-Appellant filed a motion to dismiss the indictment for lack of speedy trial on November 24, 1975. The motion was not heard by the Court until August 2, 1976, approximately one week prior to the then scheduled trial date. That motion was first noticed for hearing for March 15, 1976 but was adjourned at the request of the defense attorney. The reason for dismissal alleged in that motion was failure of the trial to commence within 180 days of arraignment. Defendant-Appellant did not allege any actual prejudice resulting from the delay. Defendant-Appellant's motion was heard and denied by Judge Keith on August 2, 1976. At the same time Judge Keith stated that he would have to disqualify himself from hearing the case because of a personal acquaintance with the Defendant-Appellant. An order to this affect was entered on August 12, 1976 and the case reassigned to the third Judge, Judge Robert E. DeMascio.

On August 27, 1976 Judge DeMascio noticed the trial for October 12, 1976. On October 11, 1976, prior to trial commencement, through his attorney, again made a motion to dismiss for lack of speedy trial. Judge DeMascio denied the motion noting that there was no showing of actual prejudice.

On October 28, 1976, Defendant-Appellant was found guilty by the jury on five counts, and was sentenced to 6 months on two counts to run concurrently and had sentence suspended on three counts.

Summary of Facts Relevant To The Issue

1. *May 9, 1975* — Indictment was entered.
2. *May 13, 1975* — Defendant released on personal bond.
3. *May 20, 1975* — Arraignment and plea of not guilty entered.
4. *June 17, 1975* — Notice of Trial set for September 2, 1975.
5. *September 16, 1975* — Notice of Trial set for November 4, 1975.
6. *November 5, 1975* — Notice of Trial set for December 30, 1975.
7. *November 26, 1975* — Motion to Dismiss filed and set for December 15, 1975.
8. *December 4, 1975* — Reply to Motion filed
9. *February 26, 1976* — Motion hearing set for March 15, 1976.
10. *March 4, 1976* — Motion hearing set for March 22, 1976.
11. *June 8, 1976* — Notice of Trial set for July 8, 1976.
12. *July 20, 1976* — Motion hearing set for August 9, 1976.
13. *August 27, 1976* — Notice of Trial set for October 12, 1976.
14. *October 19, 1976* — Trial commences.

8. REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the Court of Appeals in its decisions affirming the decision of the district court has violated the right to a speedy trial of the defendant herein

by not following the local court Rule XXXI and the decision in *United States of America* v *William B. Clendening,* 526 F. 2nd 842 (1976) of the Fifth Circuit.

The trial of the Defendant-Appellant commenced 507 days after the date of his entering his plea of not guilty. No reason for the delay of 507 days is stated on the record or alleged in the reply brief of the government.

The passing of 507 days is a delay of an unreasonable period of time when no explaination is apparent or was given to the Defendant-Appellant, he at no time requesting an adjournment of the trial date. All five trial dates were noticed by the court and the government.

The Sixth Amendment of the United States Constitution provides in part:

> "Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and have the assistance of counsel for his defense" *Federal Code Annoted,* Constitution, Amendments 1 to 21, page 176.

This constitutional right has been defined by Congress in Rule 50(b) of the the Federal Rules of Criminal Procedure and Speedy Trial Act of 1974, which in part directs local district courts to establish a

> ". . . plan for achieving prompt disposition of criminal cases" U.S.C.A. Title 18, Federal Rules of Criminal Procedure (Chapter 208).

The Eastern District of Michigan adopted its Rule XXXI, 2(b)(1), effective September 27, 1975, providing for a period of 180 days from the date of plea of not guilty to date of trial in defining the right to a speedy trial.

Rule XXXI (4)(c) provides that,

> ". . . subject to the power of the Court to dismiss a case for *unnecessary delay* the failure to conform with the time limits prescribed in *Sections* 2 and 7 of this plan *shall not require the dismissal of* the *prosecution.*" (emphasis supplied)

This section merely states it is not an automatic dismissal of an action after 180 days; and, further provides that an unnecessary delay must be apparent. Appellant contends the record herein indicates an unnecessary delay in that no reason for the five delays of the trial date were shown to be for good cause.

Prejudice to the Defendant-Appellant resulted in that his defense evidence documentation became harder to locate as time went on, waiting for the trial to commence.

The rule has no meaning unless when a defendant has his trial delayed beyond 180 days for no reason stated or apparent, and is prejudiced in presenting his defense, that the Court dismiss the cause of action.

While, with a superficial glance, it would seem that the right to a speedy trial seeks primarily to protect society's interest in promptly disposing of criminal charges, so as to enhance the administration of justice, the Bill of Rights is of the people, and really written by the people and for the people, of whom accused defendant is a member.

As such, the Bill of Rights Amendment must be construed in its broadest sense as governing in favor of the accused defendant and, like the presumption of innocence, follows the accused defendant through all stages from indictment to the last moment before conviction.

Delay is also a failure of due process, and prejudicial to the accused as a consequence of being charged with a crime, with disruption of employment, drain upon his financial resources, shame and stigma pending charge, anxiety to himself, family and friends. *U.S.* v *Marion,*

404 US 307 (1971). Here, accused-defendant, a self-employed, solely owned contractor, was barred from dealing with HUD, right from the onset of the INDICTMENT. His making repairs and improvements, with the approval of HUD, was his entire life and sole method of operation for the three years preceding the INDICTMENT.

In *U.S.* v *Clendening*, supra, page 846, the court said:

> "We also noted that the demands of the plan are stricter in many respects than the demands of the speedy trial clause of the Sixth Amendment."

The petitioner contends that those demands of Rule XXXI has been denied.

9. CONCLUSION

For the reasons aforementioned, petitioner does pray that a Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,
EDWIN B. UGOROWSKI
Attorney for Petitioner
751 Morely Court
Dearborn, Michigan 48124
1-313-562-7966

APPENDIX A

No. 77-5134

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Filed: Nov. 10, 1977)
John P. Hehman, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM PERKINS,
Defendant-Appellant.

ORDER

Before: PHILLIPS, Chief Circuit Judge, and CELEBREZZE, Circuit Judge, and GRAY,* District Judge.

This cause came before this Court to be considered on the record on appeal, and on the briefs and oral arguments of counsel for each party. The Court, being fully advised in the premises, has concluded that the District Court did not err in refusing to dismiss the indictment, there being no requirement to do so under the local rules for the Eastern District of Michigan, the Speedy Trial Act, 18 U.S.C. § 3161 et. seq., or the Sixth Amendment to the Constitution, *Barker* v. *Wingo*, 407 U.S. 514 (1972).

Accordingly, it is ORDERED that the judgment of the District Court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

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*The Honorable Frank Gray, Jr., Senior Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

APPENDIX B

No. 77-5134

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Filed: Jan. 16, 1978)
John P. Hehman, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM DONALD PERKINS,
Defendant-Appellant.

ORDER

Before: PHILLIPS, Chief Circuit Judge, and CELEBREZZE, Circuit Judge, and GRAY* Senior District Judge.

Appellant filed a petition for rehearing with a request for rehearing en banc. No Judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

*The Honorable Frank Gray, Jr., Senior Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

APPENDIX C

RULE XXXI

PROMPT DISPOSITION OF CRIMINAL CASES AS REQUESTED BY RULE 50(b)

Pursuant to the requirements of Rule 50(b) of the Federal Rules of Criminal Procedure effective October 1, 1972, and in conformity with the provisions of the Speedy Trial Act of 1974 (Chapter 208, Title 18, U.S.C.), and the Federal Juvenile Delinquency Act as amended (18 U.S.C. §§ 5036, 5037), the Judges of the United States District Court for the Eastern District of Michigan have adopted the following plan to minimize undue delay and to further the prompt disposition of criminal cases:

1. *Priorities in Scheduling Criminal Cases*

a.) Preference shall be given to criminal proceedings as far as practicable as required by Rule 50(b) of the Federal Rules of Criminal Procedure.

b.) The trial of defendants in custody and high risk defendants as hereinafter defined should be given preference over other criminal cases.

c.) Individual calendars shall be managed so that it will be reasonably anticipated that every criminal case set for trial will be reached during the week of original setting.

2. *Time Requirements*

Subject to the provisions of Section 3 hereof, the Judges of this Court will observe the following time limits, which are deemed to be maximum time limits:

a.) Arraignments. If a defendant is prosecuted on an information or an indictment he shall be arraigned and enter a plea within 10 days, if in custody, or within 15 days, if not in custody, calculated from the date of the filing of the information or the return of the indictment. The provisions of this rule do not supersede or in any way qualify the requirements of Rules 5, 9 and 40 of the Federal Rules of Criminal Procedure regarding the prompt production of persons taken into custody before a judicial officer for the purpose of setting bail.

b.) Trials of the various categories of defendants shall be as follows:

1.) Trial of defendants in custody.
Trial of a defendant held in custody solely for the purpose of trial shall commence within 90 days following the beginning of continuous custody.

2.) Trial of high risk defendant.
Trial of high risk defendant shall commence within 90 days of the determination or designation as "high risk".

3.) The trial of any defendant shall commence within 180 days of a plea of not guilty.

c.) Sentencing. A defendant shall ordinarily be sentenced within 60 days of the date of his conviction or plea of guilty or nolo contendere*

d.) Apprehension outside of district. Where a defendant is apprehended outside of this district and is held in custody, the times set out above shall begin to run:

1.) in cases initially processed under Rule 20 of the Federal Rules of Criminal Procedure, and at such time as the defendant rejects disposition under Rule 20, and

2.) in proceedings under Rule 40(b), upon the finding and recommendation or order by the Magistrate that a warrant of removal shall issue, or upon the defendant's arrest pursuant to a warrant issued on an indictment or information filed in this district.

e.) Where a defendant is apprehended outside of this district and is released pursuant to the provisions of Chapter 207, Title 18, U.S.C., the times set out above shall begin to run when the defendant returns to this district.

f.) The implementation of other sections of this Plan will in most cases dispose of a criminal case in substantially less time than the maximum herein set forth.

3. *Extension of Time Limits*

Any period of time prescribed by this rule may be extended by the Court, except for the time limits prescribed by 2(b)(1) and 2(b)(2), if the Court is satisfied that the ends of justice are served, taking into account the public interest in the prompt disposition of criminal cases and the right of the defendant to a speedy trial. The following factors may be considered by the Court in determining whether extensions or continuances should be granted:

---

*This period takes into account the time required for a Sentencing Council procedure as used in this District.

a.) Other proceedings concerning the defendant, including, but not limited to, proceedings for the determination of competency and the period during which he is incompetent to stand trial, extraordinary pretrial motions, stays, interlocutory appeals, trial and other charges, and the period during which such matters are under consideration.

b.) The period of delay resulting from continuance granted by the Court for persuasive reasons, on application of the defendant or the prosecution.

c.) Consent of the defendant. A defendant without counsel shall not be deemed to have consented thereto unless he has been advised of his rights under these rules and the effect of his consent.

d.) The unavailability of material evidence when in the exercise of diligence such evidence has not been obtained but will be available within a reasonable period.

e.) Additional time is required to prepare the government's case or a defense and such time is justifiable by the nature or exceptional circumstances of the case.

f.) The absence or unavailability of the defendant or a material witness.

g.) Where the defendant is one of two or more defendants for whom the time for trial has not run and severance is not practical and provided any resulting delay is not unreasonable.

h.) The detention of the defendant in another jurisdiction, provided the United States Attorney has made reasonable and diligent efforts to obtain the presence of the defendant for trial.

i.) The period during which the defendant is without counsel for reasons other than the failure of the Court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

j.) Other periods of delay occasioned by exceptional circumstances.

4. *Effect of Non-Compliance With Time Limits*

a.) Upon the expiration of the time limits prescribed by Section 2(b)(1) or 2(b)(2) of this plan:

1.) A defendant in custody solely because he is awaiting trial and whose trial has failed to commence through no fault of the accused or his counsel shall be released subject to such conditions as the Court shall impose in accordance with 18 U.S.C. § 3146.

2.) A high risk defendant whose trial has not commenced through no fault of the attorney for the government shall have his release conditions automatically reviewed. A high risk defendant who is found by the Court to have intentionally delayed the trial of his case shall be subject to an order of this Court modifying his non-financial conditions of release under Chapter 207, Title 18, U.S.C., to ensure that he shall appear at trial as required.

b.) Subject to the provisions of 18 U.S.C. § 3146, if the Court finds that a defendant who is not in custody is responsible for failure to comply with the time limits, such defendant may have his release revoked unless there is good cause shown for the failure to comply.

c.) Subject to the power of the Court to dismiss a case for unnecessary delay, the failure to conform with the time limits prescribed in sections 2 and 7 of this Plan shall not require the dismissal of the prosecution.

5. *Procedures Intended to Facilitate Prompt Disposition of Cases*

a.) All pre-trial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the Court's criminal docket.

b.) The Court or the Magistrate at the time of arraignment or at the time of any proceeding preliminary to arraignment shall promptly appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure. If a defendant appears for arraignment without counsel, his arraignment may be postponed not more than one week to permit him to obtain or to consult with counsel. When appropriate, the Court may cause a plea of not guilty to be entered for the defendant. The Court shall take adequate steps to ensure that defendants are represented by counsel.

c.) A trial date shall be set at the time of arraignment or at the earliest practicable time thereafter. Trial dates for defendants subject to section (2)(b)(1) or (2)(b)(2) shall be set for not more than 75 days after the beginning of the continuous detention or the designation as high risk.

d.) Except for good cause shown, the Court may not extend the time for motions under Rule 12(b)(3) of the Federal Rules of Criminal Procedure beyond ten days after plea. Such motions will be heard and ruled upon promptly, so that the trial need not be delayed.

e.) If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

6. *Retrials*

Subject to the exclusions provided in 18 U.S.C. § 3161(h), where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event, not later than 60 days after the finality of such order. If the defendant is to be retried following an appeal or collateral attack, the Court may extend such time for a period not to exceed 180 days from the date on which the order occasioning the retrial becomes final. The Court may grant an extension of time only in cases where unavailability of witnesses or other factors resulting from passage of time shall make trial within 60 days impractical.

7. *Review of Defendants in Custody and Delinquent Cases*

a.) The United States Attorney shall, within five days after the close of the reporting period, furnish the Court with a copy of the bi-weekly DJ-130 report of persons in custody, on which shall be indicated the Judge or Magistrate to whom the case has been assigned. The "reason for detention" column

shall include an explanation in any case for which the defendant's status appears to be inconsistent with the time limits set forth in the plan. A copy of such report shall be furnished each Judge, Magistrate and Clerk of the Court.

b.) The United States Marshal shall, every month, furnish each Judge, Magistrate and Clerk of the Court with a statement of persons in federal custody and the date of such custody according to his records.

c.) At not more than three-month intervals, the Court shall review the status of all persons in custody and all cases in which the maximum time limits set forth in section 2 have been exceeded. Cases shall be reassigned as appropriate in order to carry out the purpose of this plan. The United States Attorney shall be informed of any case in which his office appears to be responsible for unnecessary delay.

8. *Responsibility of United States Attorney*

a.) The Court has sole responsibility for setting and calling cases for trial. A conflict in schedules of assistant United States Attorneys will not be grounds for a continuance or delayed setting except under circumstances approved by the Court and called to the Court's attention at the earliest practicable time. Each Judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with the scheduling procedures of each Judge and will assign or

or reassign cases in such manner that the government will be able to announce ready for trial.

b.) If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state, or other institution or that of another jurisdiction, it is his duty promptly:

1.) to undertake to obtain the presence of the prisoner for plea and trial; or

2.) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under the Federal Rules of Criminal Procedure and this Plan.

c.) If a defendant is being held in custody awaiting trial, the United States Attorney shall be responsible for advising the Court at the earliest practicable time of the date of the beginning of custody.

d.) It is the responsibility of the United States Attorney to advise the Court at the earliest practicable time (usually at the hearing with respect to bail) that the defendant is considered by him to be of "high risk".

10. *Juvenile Proceedings*

An alleged delinquent who is in detention pending trial shall be brought to trial within 30 days of the date upon which such detention was begun.

Upon the expiration of such time limit, on the motion of

the alleged delinquent or at the direction of the Court, the case shall be dismissed, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel or was consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case.

If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than 20 Court days after trial, unless the Court has ordered further study of the juvenile in accordance with 18 U.S.C. § 5037(c).

11. *Definitions*

a.) "Custody". As used in this Plan, "custody" means custody on the federal charge contained in the pertinent complaint, information or indictment.

b.) "High Risk". A "high risk" defendant is:

1.) one whose chances of appearing at his trial or other Court proceedings have been judicially determined to be poor; or

2.) one reasonably designated by the United States Attorney as posing a danger to himself or any other person, or to the community.

12. *Effective Date of Plan*

This Plan shall become effective September 29, 1975.